No. 87-174

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

EDWARD O. TURNER,
Petitioner,

VS.

ELISE D. MCINTOSH, SUSAN C. SORRELLS, ODESSA HOLLIS, ANN E. KENNEDY, JOANN SCHERBRING, CASPAR WEINBERGER, Secretary of Defense, and JOHN O. MARSH, JR., Secretary of the Army,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is a *Bivens* action against a federal personnel officer who destroyed the records of a reconstruction of a promotion action and failed to report the results to national headquarters, records which showed that the persons actually selected for promotion were not qualified and that the plaintiffs in the action should have been referred as best qualified, precluded under *Bush v. Lucas,* 462 U.S. 367 (1983), *Brown v. G.S.A.,* 425 U.S. 820 (1976), or *Carlson v. Green,* 446 U.S. 142 (1980)?

2. May a *Bivens* action asserting a violation of the Fifth Amendment be predicated either upon the theory that federal employees have a property interest in their EEO claims such that destruction of evidence central to their claims and not available elsewhere deprived them of due process, or upon the theory that career federal employees in the non-excepted service have a property interest in their agency's merit-promotion system and a legitimate expectation that their applications for promotion will be fairly judged on the merits, such that destruction of records adverse to the agency, and concealment of the adverse results from higher authority, violated due process?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Elise D. McIntosh, Susan C. Sorrells, Odessa Hollis, Ann E. Kennedy, and JoAnn Scherbring, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Eighth Circuit's opinion in this case. That opinion is reported at 810 F.2d 1411 (1987) (App. 1a-45a).[1]

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[1] "App." refers to the Appendix to the Petition For A Writ Of Certiorari; "Tr." refers to the Transcript of the jury trial in this matter. "Pet." refers to the Petition For A Writ of Certiorari filed by Edward Turner. Respondents have not filed a separate appendix to this brief in opposition.

STATEMENT OF THE CASE

Respondents incorporate by reference the statement of facts in the opinion below (App. 3a-14a). Additional facts are noted here to correct inaccuracies and omissions in the petition.

Petitioner, Edward Turner, recites the evidence he presented at trial that he set aside the Steins-Henson reconstruction results on the promotion actions because Steins and Henson had exceeded what he had asked them to do. (Pet.3) The appeals court's opinion notes that the jury heard the testimony of plaintiff's expert witness, former OPM employee, Chris Kunz, that the term "reconstruct" had a generally accepted meaning in the federal personnel field, and that it meant that both the minimum qualification determination and the rating-and-ranking phase were to be redone. (App. 10a) The evidence indicated that Steins and Henson performed the task that they were intended to perform.

In addition, the jury heard testimony from Steins and Henson, the personnel employees who conducted the reconstruction, that the members of the rating and ranking panel in question were not contacted or recruited by either of them. (Tr. 2-42, 71) Members of the panel testified that they were called upon by their supervisors or by the personnel office to sit on the panel. (Tr. 2-88, 95, 100, 118, 129-30) Turner therefore set aside, concealed, and destroyed the results of a reconstruction action that his personnel office staff had helped to set up, and he then had another group including himself do an evaluation of the selections, in which the original selections were rubber-stamped. As a result of his actions, the government officers in Virginia received a report that was false, for it excluded the information contained in the destroyed records.

Petitioner's statement of the case also omits reference to the series of requests by the plaintiffs' union representative for the results of the Steins Henson reconstruction, some of which were

made prior to the shredding of the documents, and to which the agency made misleading responses. (App. 11a-12a)

The testimony of witnesses to the Steins-Henson reconstruction was that none of the persons actually selected for promotion were rated even minimally qualified. Plaintiffs Sorrells, Kennedy, and McIntosh, it was recalled at trial, were found in the reconstruction to be best qualified, indicating that their names should have been referred to the selecting supervisors, while no one recalled the Steins-Henson reconstruction results for plaintiffs Hollis and Scherbring. (App. 12a)

REASONS FOR DENYING THE WRIT

This Court held in *Bush v. Lucas,* 462 U.S. 367 (1983), that federal employees who are removed or demoted in violation of their constitutional rights are restricted to the remedies available to them under the civil service statutes, and that the Court would not authorize a damages action for such employees under the First Amendment as it had under the Fourth Amendment in *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388 (1971). Justice Marshall, joined by Justice Blackmun, stated in a concurring opinion in *Bush:* "... [T]here is nothing in today's decision to foreclose a federal employee from pursuing a Bivens remedy where his injury is not attributable to personnel actions which may be remedied under the federal statutory scheme." *Id.,* at 391.

This case falls precisely within the language of Justice Marshall's concurring opinion in *Bush,* as it involves the denial of promitions, which is not a matter which could be appealed to the Merit Systems Protection Board under the Civil Service Reform Act of 1978, 5 U.S.C. §7501 et seq.

Contrary to the petitioner's assertions, therefore, the holdings of the lower courts here are not in conflict with *Bush v. Lucas,* and certiorari is not warranted on that basis. Moreover, the other reasons urged for granting the writ assert that the deci-

sion below is erroneous, and should be reviewed by this Court, on grounds which petitioner has not included in his questions presented, and for that reason and because the points lack merit the granting of certiorari to review the decision below would be unwarranted.

I. The Decision Below Does Not Conflict With Either *Bush v. Lucas*, 462 U.S. 367 (1983) Or *Parratt v. Taylor*, 451 U.S. 527 (1981), It Was A Correct Decision, And Does Not Merit Review By This Court.

This Court's decision in *Bush* involved a suit brought by a federal employee who was demoted, allegedly in retaliation for the exercise of First Amendment rights, and who had also taken an appeal to the Federal Employee Appeals Authority, *Id.*, at 370. The Civil Service Commission's Appeals Review Board ultimately reviewed the case, *Id.*, at 371, and ordered that the employee be reinstated in his former position and given back pay of approximately $30,000. The employee argued that he should also be permitted to pursue a cause of action under the First Amendment because the Civil Service remedies afforded to him were inadequate by comparison with a jury trial for damages. The Court, upon extensive examination of the statutory and regulatory scheme permitting federal employees to appeal from demotions or removals, *Id.*, at 659-664, disagreed.

Petitioner here draws from the holding in *Bush* a much broader proposition, that federal employees are precluded by the existence of civil service remedies for some wrongs from bringing suit against federal supervisory employees for violations of any constitutional rights, regardless of whether or not Congress has provided a remedy for the wrong at issue. (Pet. at 10) Petitioner would have this Court hold that even where Congress has not provided a federal employee with a remedy against unlawful conduct, the wrong should go without a

remedy.[2] Such a result is not required by *Bush*, as the 8th Circuit held. (App. 40a-42a)

Other courts have declined to hold that *Bush* precludes all constitutional tort claims by federal employees. In *Williams v. Internal Revenue Service*, 745 F.2d 702, 705 (D.C. Cir. 1984), the D.C. Circuit declined to hold that *Bush* disposed of a federal employee's First Amendment claim where the employee had no civil service remedy. The D.C. Circuit relied on the pre-*Bush* case of *Borrell v. United States International Communications Agency*, 682 F.2d 981 (D.C. Cir. 1982). *Borrell* held that civil service procedures did not supplant a probationary federal employee's First Amendment claim because the civil service statute did not protect probationary employees. In *Doe v. United States Department of Justice*, 753 F.2d 1092 (D.C. Cir. 1985) the D.C. Circuit declined to dismiss a federal employee's *Bivens* action. The court noted, "*Bush* held only that where civil servants enjoy meaningful *and constitutionally adequate, see Bush,* 103 S.Ct. 2411 n.10, statutory remedies for first amendment violations, federal courts should not imply an additional *Bivens*-type *damages remedy* under the constitution. The *Bush* holding in no way affects the scope of constitutional rights...." *Doe* at 1109, n.17.

In another case, *Bartel v. Federal Aviation Administration*, 725 F.2d 1403 (D.C. Cir. 1984), the D.C. Circuit reversed the district court's dismissal of the federal employee's due process claims, holding, "The district court ... must entertain Bartel's due process claims for damages attributable to wrongful conduct for which that scheme [appeal to the MSPB] provides no remedy, along with those for injunctive relief." *Id.*, at 1415. In

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[2] See *Bush, supra,* at 378 n.14: "We need not reach the question whether the Constitution itself requires a judicially-fashioned damages remedy in the absence of any other remedy to vindicate the underlying right, unless there is an express textual command to the contrary. Cf. Davis v. Passman, supra [442 U.S. 228] at 246 [(1979)]..."

so holding, the D.C. Circuit relied on Justice Marshall's concurring opinion in *Bush*. *Id.*.

In a case brought under a governmental action theory against a private employer closely involved with the federal government, the D.C. Circuit has held that a *Bivens* remedy for constitutional torts is not barred by *Bush*. *Reuber v. United States*, 750 F.2d 1039, 1058 (D.C. Cir. 1985). The court discussed in detail and rejected the argument that *Bush* operates to preclude a remedy in the federal employment context where the employee has no other remedy. *Id.*, at 1058-59.

Several cases decided before *Bush* anticipated, and rejected, the type of broad preclusion argument made by Turner here. *Egger v. Phillips*, 710 F.2d 292, 298 (7th Cir. 1983) *cert. denied*, 464 U.S. 918 (1983) ("to the extent that *Bush* [598 F.2d 958 (5th Cir. 1979)] posits that the rights of federal employees *qua* employees are coterminus with the administrative protections afforded by Congress, we reject it"); *Ray v. Nimmo*, 704 F.2d 1480, 1486 (11th Cir. 1983) (pre-*Bush* decision remanding employee's due process claim for the reason that she may not have had access to an administrative remedy because of her unique employment position).

This is a case in which a federal personnel official committed a shocking act of destruction and concealment of information. petitioner argues that the plaintiffs' pursuit of EEO claims against the selecting supervisors was an adequate remedy for the wrong done by Turner. However, plaintiffs never claimed that Turner's actions were racially discriminatory or in retaliation for the filing of EEO claims, but rather asserted that Turner acted, in the words of the court of appeals, "out of a bureaucratic desire to squelch charges that ALMSA employees had not done their duty." (App. 41a) The jury accepted the plaintiffs' theory that Turner's concealment of the Steins-Henson reconstruction results undermined the procedural protections which the reconstruction was intended to provide (App. 39a) and that the

plaintiffs were thereby injured. Neither this reconstruction, nor Turner's conduct, had anything to do with the discrimination claims or with the EEO process, other than the evidence the reconstruction would have provided of the relative qualifications of the plaintiffs and the selectees. The existence of an EEO remedy for the denial of the promotions, therefore, is not a remedy for the wrongs done by Turner, as the wrongfulness of his conduct was separate and apart from that of the selecting supervisors who selected young white women for all of the positions.

The other purported remedies petitioner refers to were unavailable to the plaintiffs. The demotion in *Bush* was an action appealable to the Merit Systems Protection Board under 5 U.S.C. §7512, which applies to a removal, a suspension for more than fourteen days, a reduction in grade, and a furlough of thirty days or less. *Bush, supra,* at 381-388. Here, by contrast, Turner's action against plaintiffs was not appealable to the MSPB because it is not an adverse action within the definition of 5 U.S.C. §7512. Destruction of records is not one of the actions ennumerated in the statute. Denial of a promotion is also not an adverse action within the jurisdiction of the MSPB. *Williams v. Department of the Army,* 651 F.2d 243 (4th Cir. 1981). *See also, Biddle v. United States,* 602 F.2d 441 (D.C. Cir. 1979) and *Dreher v. United States Postal Service,* 711 F.2d 907, 909 (9th Cir. 1983), both discussing the limits of MSPB jurisdiction.

An administrative grievance under Army Regulation 690-700 (App. 89a) was not available to the plaintiffs, primarily because they were members of the union bargaining unit (AR 690-700, 1-7.b.(16), App. 92a); it would also have been unavailable because the matter arguably involved "non-selection from a properly constituted referral list or certificate of candidates" (AR 690-700, 1-7.b.(3), App. 90a), and because the matter of improprieties in the agency's merit selection process was a matter subject to the final administrative review of OPM (AR 690-700, 1-7.b.(2), App. 90a).

The option of a suit under the Federal Tort Claims Act, 28 U.S.C. §1346(b), mentioned briefly by petitioner, was never raised below. More importantly, though, a claim under the FTCA was not available because the government is immune to suit under a *Bivens* theory. *Laswell v. Brown,* 683 F.2d 261, 268 (8th Cir. 1982) *cert. denied,* 459 U.S. 1210 (1983) (citing *Bivens, supra,* 403 U.S. at 410). In addition, claims under the FTCA must have a basis in state tort law, and *Bivens* actions arising under the Constitution do not fall within the FTCA. *Birnbaum v. United States,* 588 F.2d 319, 327-28 (2nd Cir. 1978).

The option of filing a complaint to the Special Counsel of the Merit Systems Protection Board is not a remedy for a federal employee who has been wronged by unlawful action taken in connection with a promotion, because prosecuting such a complaint is not a matter of right for the employee. While the Special Counsel is obligated to accept a complaint and investigate it to some degree, 5 U.S.C. §1206 (a)(1) (App. 74a), any further action by the Special Counsel is discretionary and is not within the control of the employee. 5 U.S.C. §1206 (a)(3)(A) (App. 74a); 5 U.S.C. §1206 (c)(1)(A) and (B) (App. 76a). The existence of the MSPB Special Counsel has specifically been held not to bar a *Bivens* action because of the discretionary nature of any action by the Special Counsel and because the injured employee is not a party to the action. *Borrell v. United States International Communications Agency,* 682 F.2d 981 (D.C. Cir. 1982). *Borrell* has been cited and relied upon in a post-*Bush* decision of the D.C. Circuit. *Williams v. Internal Revenue Service,* 745 F.2d 702, 705 (D.C. Cir. 1984).

The argument that this case presents a mere evidentiary issue, for which the application of an evidentiary presumption would be an adequate remedy (Pet. 12-13) misses the point. An evidentiary presumption must be applied within the context of a legal proceeding, and a presumption against Turner would not necessarily be permitted against the agency or the selecting officials. The wrongful actions of Turner and of the selecting

supervisors were separate acts, although Turner's conduct clearly was viewed by the jury as a cover-up of wrongful conduct by other agency employees. Moreover, this argument attempts to trivialize conduct which the jury found to be substantial, as evidenced by the size of the jury's verdict.

Finally, petitioner argues that the result here conflicts with *Parratt v. Taylor,* 451 U.S. 527 (1981) and *Hudson v. Palmer,* 468 U.S. 517 (1984). Petitioner fails to indicate what state tort remedies for Turner's conduct were available, however, making this argument a mere watered-down repetition of his point under *Bush v. Lucas, supra,* above.

II. The Eighth Circuit Did Not Misapply The Standards For Qualified Immunity, And The question Of Qualified Immunity Is Not Before The Court.

In order for a *Bivens* claim to exist, deprivation of a constitutionally protected right must exist. Whether or not the right was clearly established at the time of the alleged wrongful conduct is relevant to the question whether a government official sued in his individual capacity is entitled to qualified immunity from suit, a question of law which can be determined prior to trial. *Mitchell v. Forsyth,* 472 U.S. 511, 105 S. Ct. 2806 (1985). If, however, the right in question is found by the trial court to have been clearly established at the time of the conduct, then the defendant is not entitled to dismissal prior to trial, and, absent prevailing in an immediate appeal, must rely upon presenting evidence of the reasonable nature of his conduct to the trier of fact in order to sustain the defense. *Mitchell, supra,* at 526-28. Here, the district court found a clearly established right under *Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982), and moreover, found that Turner's duties were ministerial and not discretionary under *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). The court of appeals did not rely upon ministerial/discretionary distinctions (App. 34a-35a). The Court of Appeals held that the rights in question were clearly established under the theory of a

property interest in EEO claims, relying on *Logan, supra,* and *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950) and under the alternative theory that the plaintiffs had a clearly established right to have their applications for promotion considered on a merit basis, relying upon the body of statutes and regulations governing the promotions here and *Perry v. Sinderman,* 408 U.S. 593, 602 (1972). The court of appeals stated, in holding that Turner was not entitled to qualified immunity: "We do not think it could be seriously argued that the fundamental unfairness of such a subversion of the whole process would not have been clear to a reasonable person in Turner's position." (App. 39a) The court of appeals' decision was correct.

The Eighth Circuit's analysis in *Anderson v. Creighton,* 483 U.S. ____, 107 S.Ct. 3034 (1987), has no relation to the questions presented for review here. *Anderson* involved a *Bivens* action against an F.B.I. agent and the standards of reasonableness to be considered with regard to qualified immunity. Petitioner's suggestion that the Eighth Circuit's reasoning was facile in that case and facile here is unworthy of consideration as a reason for granting certiorari.

The cases petitioner cites for the proposition that "a government employee does not acquire Constitutionally-protected rights in promotion merely because the Government promulgates guidelines and procedures for selecting among candidates," *Bigby v. City of Chicago,* 766 F.2d 1053, 1056-57 (7th Cir. 1985), *cert. denied,* 474 U.S. 1056 (1986), *Goodisman v. Lytle,* 724 F.2d 818, 820-21 (9th Cir. 1984); and *Beitzell v. Jeffrey,* 643 F.2d 870, 876 (1st Cir. 1981), do not stand for a general proposition that a government employee never has a protected property interest arising from promotion procedures. Each holds that in the specific context at issue, that of Chicago police officers taking a civil service exam, of a university professor seeking tenure, and that of an assistant professor denied tenure, such a protected property interest did not exist. No

court that respondents are aware of has held that a federal employee does *not* have a property interest arising from federal merit promotion procedures.

In addition, petitioner has failed to raise the issue of qualified immunity in the questions he has presented to the Court; to then suggest that there is a basis for review in the lower court's determination of that issue makes little sense. The matter of qualified immunity was presented to the district court on a motion for summary judgment, which was denied, and was then presented to the jury, the procedure this Court suggested in *Mitchell, supra,* at 527; the jury rejected the defense and that has been affirmed on appeal. Thus no question for review by this Court is presented.

Petitioner also presents a "floodgate" argument in support of this Court granting review, suggesting that *Bivens* actions are being filed at a rate of 1,000 per year and suggesting that the number of suits filed shows the need for additional limitations. Petitioner does not suggest how many of these suits involve federal employees as plaintiffs. However, other data suggests that existing procedural and substantive limitations on a plaintiff's rights are in fact having a very substantial effect.

In July, 1986, when the Department of Justice issued its Statement of Policy Concerning Indemnification of Department of Justice Employees, 51 Fed. Reg. 27,021, the department stated that only 32 adverse judgments against individual federal employees had occurred since the decision in *Bivens. Id.,* at 27,022. Respondents are not aware whether the present case was included in that figure, but in any case, the number of federal employees with *Bivens* claims who have ultimately prevailed is extremely low, suggesting that additional restrictions are not needed. There is a vast difference between the mere filing of a claim, the figure petitioner offers, and prevailing on the merits.

Petitioner offers the spectacle of disgruntled, vindictive persons acting as private attorneys-general causing vexation to federal officials, and suggests that where great loss to the government caused by an official, some internal action will be taken to discipline the official. However, the jury found, and the appeals court here affirmed, that real, substantial loss was caused to the plaintiffs. The jury did not view plaintiffs as vindictive or disgruntled. Disciplinary action against Edward Turner may satisfy the government's interests in reducing its future losses from similar conduct, but would in no way compensate the victims of Turner's cover-up.

III. The Eighth Circuit properly found that plaintiffs had proven the element of causation, and the question of causation is not before the Court on the questions presented by petitioner.

Petitioner's final point suggests that review by this Court is warranted because, it is claimed, the courts below erred in finding that plaintiffs had adequately proven causation. Mere error in the decision below, even if it were present, would not support review by this Court. The point is not among those presented for review, and petitioner's causation argument was fully considered and rejected by the Court of Appeals. (App. 42a-43a) In addition, the suggestion that the district court's judgment for the defendants on the discrimination claims shows that the plaintiffs were not entitled to the promotions sought is a distortion; the district court held that the plaintiffs had not proven that they were discriminated against on the basis of race and national origin, and did not decide the abstract question whether the plaintiffs should have been promoted. Moreover, the jury was instructed that in order to find for the plaintiffs, it must find that the plaintiffs were better qualified, and it did so find, a finding which, plaintiffs have argued in their cross-petition, should have been determinative on the question of pretext on the Title VII claims.

The judgment against Edward Turner here is not a matter for surprise or dismay, but rather indicates that the judicial processes are functioning as they should. Turner's conduct was outrageous, and the jury so found. This case is not one involving an extension of any existing legal principles, nor is there any conflict between the decision here and any decisions of the Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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